Supreme Court, U.S.
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No. 97-208

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

NATIONAL ACADEMY OF SCIENCES,

PETITIONER,

v.

ANIMAL LEGAL DEFENSE FUND,
PSYCHOLOGISTS FOR THE ETHICAL TREATMENT
OF ANIMALS, AND ASSOCIATION OF
VETERINARIANS FOR ANIMAL RIGHTS,

RESPONDENTS.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

James R. Wright
Audrey B. Mosley
National Academy of Sciences
2101 Constitution Ave., N.W.
Washington, D.C. 20418
(202) 334-2440

Carter G. Phillips
Sidley & Austin
1722 I Street, N.W., Suite 900
Washington, D.C. 20006-3795
(202) 736-8000

October 10, 1997

Richard A. Meserve*
Elliott Schulder
Covington & Burling
1201 Pennsylvania Ave.,N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-6000

Attorneys for Petitioner

*Counsel of Record

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The National Academy of Sciences ("NAS" or "Academy") demonstrated in its petition that the decision of the court below threatens to destroy the very effective means by which the Academy has provided invaluable scientific advice to the government on vital public issues. The force of the NAS' concerns has been reinforced by the Brief *Amici Curiae* in support of the NAS' petition that has been submitted by 84 prominent scientists who have participated in or benefitted from the Academy's activities over the years. In this brief, NAS replies to the oppositions submitted by the federal respondents and by the Animal Legal Defense Fund and its sister organizations (collectively "ALDF").

ARGUMENT

1. The federal respondents state that they "disagree with the court of appeals' decision in this case and share many of petitioner's objections to the court's reasoning." Brief for Federal Respondents in Opposition at 7 ("Fed. Opp."). Nonetheless, they urge the Court to deny review. None of the justifications for denying review can withstand scrutiny.

a. The federal respondents state that "[o]nly if this Court were prepared fundamentally to reconsider its statements about the Academy, based on a more complete presentation of the issue than was before the Court in *Public Citizen*, would review be warranted." *Id.* at 11; *see id.* at 8-11. But it is for exactly this reason that the NAS has filed its petition: the court below believed that it was compelled to rule against the NAS on the basis of this Court's statements about the NAS in a decision in which the NAS was not a participant. Only this Court can provide the NAS with its day in court.

b. The Solicitor General asserts that this case is not representative of how federal agencies most commonly interact with the Academy, citing (1) that the NAS approached the

federal government to support the revision of *The Guide for the Care and Use of Laboratory Animals* (the "*Guide*") and (2) that this case involves a grant rather than a contract. *Id.* at 12-13. But there is no "common" or "standard" means by which the NAS interacts with the government and the instant study is certainly not in any sense unusual.

The considerations cited by the federal respondents do not justify the denial of review. The NAS estimates that approximately 32 percent of the 236 studies that were authorized in 1996 arose from an NAS initiative and some 68 percent arose from an external request. Moreover, the origin of the first contact between the government and the NAS cannot be determinative because the initiation of a study is frequently the product of a complicated interaction between the NAS and potential government sponsors. The accident of who raised the idea of a study first is thus largely irrelevant to the core statutory issue of whether the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. II, applies to NAS committees.

Similarly, while the NAS prepared the *Guide* pursuant to a grant rather than a contract, this fact is of no moment. Approximately 30 percent of the studies initiated with government support in 1996 were pursuant to grants, 59 percent were pursuant to contracts, and 11 percent were pursuant to cooperative agreements. The particular form of the legal relationship in no way affects how the NAS manages its committees or how those committees operate. Congress made plain its intent that the word "utilized" in FACA does not encompass committees established by a government

contractor,[1] and there is no principled reason why the same rule should not apply to committees formed by a grantee. *See Henke v. United States Dep't of Commerce*, 83 F.3d 1445, 1450 (D.C. Cir. 1996) ("grant agreement [with the National Science Foundation] includes the essential elements of a contract and establishes what would commonly be regarded as a contractual relationship between the government and the grantee").[2]

c. The federal respondents also argue that certiorari should be denied because there is no circuit conflict. Fed. Opp. at 13. But, because the vast preponderance of FACA litigation arises in the D.C. Circuit, the federal respondents acknowledge that the absence of a conflict should not weigh strongly against further review. *Id.* Indeed, with the exception of this case, the D.C. Circuit has determined whether a committee is covered by FACA by examining whether the committee is subject to actual management and control by the federal government. *See Washington Legal Found. v. United States Sentencing Comm'n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994); *Food Chemical News*, 900 F.2d at 332-33. This more sensible approach, which should be the universal rule, will continue to govern cases that are not deemed to involve so-called "quasi-public" organizations.

d. The federal respondents claim that review is "premature" because the implications of the court of appeals' decision have not yet "crystallized." Fed. Opp. at 14-15. But

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[1] H.R. Conf. Rep. No. 92-1403, at 10 (1972); *see Food Chemical News v. Young*, 900 F.2d 328, 331 (D.C. Cir.), *cert. denied*, 498 U.S. 846 (1990).

[2] *See also Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (federal grant programs are "much in the nature of a contract"); *Bennett v. New Jersey*, 470 U.S. 632, 638 (1985) (same).

the obligations that FACA would impose are both unambiguous and predictable: no one has suggested that NAS can somehow evade FACA's commands governing the role of federal employees in controlling committee meetings (and even determining whether meetings can be held), governing public and governmental access to committee meetings and documents, or even governing administrative burdens such as publishing notices of committee meetings and the like. Judge Silberman, speaking for himself in concurring in the denial of rehearing *en banc*, has suggested only that the NAS might avoid the FACA requirement that committee membership must be "balanced." Pet. App. 41a n.1; *see* FACA §§ 5(b), (c). There thus is no realistic prospect that the mode of operation that the NAS has successfully followed for decades — creating a committee that is independent of the government and subject to NAS supervision and control — can somehow be reconciled with FACA's commands.

Moreover, the federal respondents' observation (Fed. Opp. at 15) that government scientists have frequently offered distinguished service to the NAS is true, but completely irrelevant. There is an obvious distinction between the NAS' engagement of the country's most thoughtful scientists — from government, universities, and industry — on its committees, and a requirement that government employees control those committees.

2. The ALDF's opposition similarly offers a series of unpersuasive arguments for the denial of certiorari.

a. ALDF seeks to diminish the significance of the case by asserting that "NAS should at least attempt to comply with FACA before it seeks review in this Court . . . ." ALDF Opp. at 17. But ALDF recites the various FACA requirements with which the NAS must conform in order to abide by the D.C. Circuit's decision (ALDF Opp. at 2-3) —

and these are exactly the provisions that will predictably and necessarily disrupt NAS' operations. NAS Pet. at 6-7. No point would be served by delay because any accommodation to FACA necessarily must intrude on the way the NAS has found it appropriate to conduct its business. And, most fundamentally, the NAS should not be forced to adapt to FACA because the statute should be found to be inapplicable to it.

ALDF also argues that "this case is essentially about one organization's status under one open government statute." ALDF Opp. at 15. Even if the ALDF were correct in asserting that the D.C. Circuit's decision is confined to the NAS,[3] the consequences of even this application are sufficiently serious as to justify review. *See* Brief *Amici Curiae* Submitted by 84 Prominent Scientists in Support of Petitioner at 8-17. It is telling that ALDF does not dispute the central role that the NAS has played in providing impartial and informed advice on important issues of public policy. *See id.* at 3-7; NAS Pet. at 7-9. It is the adverse impact of the decision below on the preservation of that national resource that justifies review.

b. ALDF argues that the NAS' comments about the errors in the ruling below are misplaced because the court of appeals was allegedly only following this Court's construction of the word "utilized" in *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989). ALDF Opp. at 18-23. It is doubtful, however, that this Court

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[3] The decision below invites litigation involving other organizations because, as the D.C. Circuit acknowledged, the term "quasi-public" is largely undefined. Pet. App. 10a. ALDF stresses that the term might be limited to organizations formed to provide advice to the government. ALDF Opp. at 15. But Washington is populated by many organizations that serve exactly that function.

intended in *Public Citizen* to establish the complicated legal structure for the interpretation of the word "utilized" that is advocated by the ALDF and that was accepted by the court of appeals. The word "quasi-public" does not appear in the statute or in the legislative history of FACA, but the court of appeals read *Public Citizen* to establish a special rule governing such organizations. In any event, *Public Citizen* is replete with references to the NAS that reflect the *assumption* that the NAS was sufficiently entangled with the government as to justify the application of FACA to NAS' committees.[4] It is the absence of any real foundation for these observations — and the binding effect that the D.C. Circuit attached to them — that justifies review.

c. ALDF disputes the assertion raised by the NAS that it is fundamentally unfair for the NAS to be bound by dicta in a case in which it had no opportunity to participate. ALDF Opp. at 24-26. First, ALDF chides the NAS for not having had the foresight to file a brief in *Public Citizen*. *Id.* at 24. But, in fact, before *Public Citizen* all three branches shared the understanding that NAS committees were *not* subject to FACA. The Office of Legal Counsel in the Department of Justice provided an opinion to that effect. C.A. App. 171-77. The district court, in a decision affirmed by the D.C. Circuit, reached the same conclusion shortly after FACA's enactment. *Lombardo*, 397 F. Supp. at 797-800. And, the Congress reviewed compliance with FACA in 1976 and even amended the law to overturn a restrictive interpretation of the open-meeting provisions of FACA, but

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[4] ALDF attaches significance to the fact that the NAS charter was enacted by Congress. ALDF Opp. at 5, 15. In fact, at the time of NAS' creation, all corporations in the District of Columbia were created by Congress. *Lombardo v. Handler*, 397 F. Supp. 792, 794 (D.D.C. 1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977).

did not indicate any disagreement with *Lombardo*.[5] The NAS thus had absolutely no reason to believe that *Public Citizen* would have any implications for it, much less to anticipate the pointed discussion of NAS that emerged in the Court's opinion.

Second, the ALDF criticizes the NAS for its "novel suggestion" that this case raises fairness issues. ALDF Opp. at 24. But, contrary to ALDF's argument, this case does not involve a general construction of a federal statute. Indeed, as ALDF elsewhere argues (*id.* at 18-20), this Court made particularized statements about the NAS — statements that the court below took to define the meaning of the so-called "quasi-public" "prong" of FACA. Pet. App. 10a-11a. It is the binding consequences of the individualized statements about the NAS in a case in which NAS did not participate that makes the decision below so offensive. *Richards* v. *Jefferson County, Alabama*, __U.S.__, 116 S. Ct. 1761 (1996).

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[5] *See Hearings on S. 2947 and 3013 To Amend the Federal Advisory Committee Act Before the Subcomm. on Reports, Accounting, and Management of the Senate Comm. on Government Operations*, 94th Cong. 838-58 (1976) (setting out full text of *Lombardo*); *id.* at 306 (FDA letter discussing *Lombardo*). Congress chose, however, only to amend FACA in other respects. *See* Pub. L. No. 94-409, § 5(c), 90 Stat. 1241, 1247-48 (1976); H.R. Conf. Rep. No. 94-1441, at 26 (1976) (setting forth reasons for amendment).

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

James R. Wright
Audrey Byrd Mosley
National Academy
of Sciences
2101 Constitution Ave., N.W.
Washington, D.C. 20418
(202) 334-2440

Carter G. Phillips
Sidley & Austin
1722 I Street, N.W.
Suite 900
Washington, D.C. 20006-3795
(202) 736-8000

Richard A. Meserve*
Elliott Schulder
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-6000

Attorneys for Petitioner

* Counsel of Record

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